

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KENNETH JAMES KINMAN and
CAROL JEAN KINMAN,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., and
MORTGAGE ELECTRONIC
REGISTRATION SYSTEM,

Defendants.

No. 2:12-cv-02853-MCE-DAD

MEMORANDUM AND ORDER

Through this action, Plaintiffs Kenneth Kinman and Carol Kinman ("Plaintiffs") seek redress against Defendants Wells Fargo Bank, N.A. and Mortgage Electronic Registration Systems ("MERS") (collectively "Defendants") based on alleged violations of California state law related to foreclosure proceedings commenced against Plaintiffs' property. Specifically, Plaintiffs allege causes of action for lack of standing to foreclose, intentional infliction of emotional distress, quiet title, slander of title, declaratory relief, and wrongful foreclosure. Presently before the Court is Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).¹ (ECF No. 20.)

¹ All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise stated.

1 Also before the Court is Defendants' Request for Judicial Notice in Support of Motion to
2 Dismiss. (ECF No. 21.) Plaintiffs filed a timely Opposition (ECF No. 22) and filed
3 Objections to the Request for Judicial Notice (ECF No. 23.)²

4 5 **DISCUSSION**

6 7 **A. Judicial Notice**

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9 "As a general rule, 'a district court may not consider any material beyond the
10 pleadings in ruling on a Rule 12(b)(6) motion.'" Lee v. City of L.A., 250 F.3d 668, 688
11 (9th Cir. 2001) (quoting Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994), overruled on
12 other grounds by Galbraith v. Cnty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)).

13 However, under Rule 201 of the Federal Rules of Evidence, a court may take judicial
14 notice of facts that are not subject to reasonable dispute because they are either
15 generally known or capable of accurate and ready determination. Id. at 688-90; Fed. R.
16 Evid. 201(b). Under Federal Rule of Evidence 201, "a court may take judicial notice of
17 'matters of public record.'" Lee, 250 F.3d at 689 (citing Mack v. S. Bay Beer Distrib.,
18 798 F.2d 1279, 1282 (9th Cir. 1986)). A deed of trust is a document that is a matter of
19 public record whose accuracy cannot be questioned. See, e.g., Thompson v.
20 Residential Credit Solutions, No. CIV 2:11-2261 WBS DAD, 2011 WL 5877075, at *2
21 (E.D. Cal. Nov. 22, 2011).

22 Defendants request that the Court take judicial notice of several documents,
23 including a grant deed recorded on January 26, 2009, in the Placer County Recorder's
24 Office. Plaintiffs object to the Request for Judicial Notice on the ground while "the court
25 may take judicial notice of the fact that a document was recorded, it may not take judicial
26 notice of factual matters stated therein." (ECF No. 23 at 2.)

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28 ² Because oral argument would not be of material assistance, the Court ordered this matter
submitted on the briefing. E.D. Cal. Local R. 230(g).

1 Essentially, Plaintiffs contend that judicial notice of the facts contained within the
2 documents is improper because those facts are hearsay and are reasonably subject to
3 dispute. (Id.) However, Plaintiffs do not challenge to authenticity of the grant deed, and
4 Plaintiffs fail to demonstrate how the facts contained within the grant deed are subject to
5 reasonable dispute. As stated above, facts contained in a public record such as the
6 grant deed are considered appropriate subjects for judicial notice. See Santa Monica
7 Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1025 (9th Cir. 2006).

8 Plaintiffs' objection is therefore overruled.

9 Accordingly, the Court hereby takes judicial notice of the grant deed recorded on
10 January 26, 2009, in the Placer County Recorder's Office. (RJN, ECF No. 21, Ex. 4.)
11 This public record establishes that on March 19, 2008, Plaintiffs, as Co-Trustees of the
12 Kenneth James Kinman and Carol Jean Kinman Revocable Trust, granted all interest in
13 the subject property to Kinman Properties, LLC.³

14 15 **B. Real Party in Interest**

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17 While Defendants caption their motion as a motion for dismissal for failure to state
18 a claim for relief under Rule 12(b)(6), Defendants raise the issue of whether Plaintiffs
19 have standing under Rule 17 to prosecute the claims alleged in the complaint as the real
20 party in interest. Accordingly, Defendants have styled their Rule 17 objection as one for
21 dismissal.⁴

22 Federal Rule of Civil Procedure 17(a)(1) provides that an action must be
23 prosecuted in the name of the real party in interest. "The real party in interest is the
24 person who has the right to sue under the substantive law.

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26 ³ The Court declines at this time to rule on the remaining documents included in Defendants'
27 Request for Judicial Notice. (See ECF No. 21.)

28 ⁴ The Rules do not specify a procedure for raising an objection that the plaintiff is not the real party
in interest. 6A Charles Alan Wright et al., Federal Practice & Procedure § 1554 (3d ed. 2011).

1 In general, it is the person holding title to the claim or property involved, as opposed to
2 others who may be interest in or benefit by the litigation.” Malikyar v. Sramek, No. C 07-
3 03533 WHA (N.D. Cal. Nov. 12, 2008) (citing U-Haul Int’l, Inc. v. Jartran, Inc., 793 F.2d
4 1034, 1038 (9th Cir. 1986)). While the real party in interest must prosecute the action,
5 Rule 17(a)(3) provides:

6 [t]he court may not dismiss an action for failure to prosecute
7 in the name of the real party in interest until, after an
8 objection, a reasonable time has been allowed for the real
9 party in interest to ratify, join, or be substituted into the action.
After ratification, joinder, or substitution, the action proceeds
as if it had been originally commenced by the real party in
interest.

10 Rule 17(a)(3) “is designed to avoid forfeiture and injustice when an understandable
11 mistake has been made in selecting the party in whose name the action should be
12 brought.” Goodman v. United States, 298 F.3d 1048, 1053 (9th Cir. 2002) (quoting 6A
13 Charles Alan Wright et al., Federal Practice & Procedure § 1555). The Advisory
14 Committee Notes to Rule 17 likewise state that Rule 17(a)(3) is “intended to prevent
15 forfeiture when determination of the proper party to sue is difficult or when an
16 understandable mistake has been made.” Fed. R. Civ. P. 17 advisory committee’s note.
17 The Ninth Circuit has followed this guidance, and allowed parties the benefit of the Rule
18 17(a)(3) safety valve when they have made an understandable mistake. See, e.g.,
19 Dunmore v. United States, 358 F.3d 1107, 1112 (9th Cir. 2004) (stating that ratification
20 under Rule 17 is permitted so long as the plaintiff’s conduct was an understandable
21 mistake and not a strategic decision); U.S. for Use and Benefit of Wulff v. CMA, Inc.,
22 890 F.2d 1070, 1075 (9th Cir. 1989) (finding that Rule 17(a) would not operate to allow
23 ratification when plaintiffs knew they were not real party in interest and filed suit to toll
24 statute of limitations).

25 “Whether [a] plaintiff is the real party in interest is determined by the controlling
26 substantive laws.” Allstate Ins. Co. v. Hughes, 358 F.3d 1089, 1093-94 (9th Cir. 2004).
27 “It is well settled that a federal court exercising diversity jurisdiction must apply
28 substantive state law.”

1 Am. Triticale, Inc. v. Nytco Servs., Inc., 664 F.2d 1136, 1141 (9th Cir. 1981); see also
2 Glacier Gen. Assurance Co. v. G. Gordon Symons Co., Ltd., 631 F.2d 131, 133 (9th Cir.
3 1980). Here, the Court has diversity jurisdiction over Plaintiffs' state law claims, and thus
4 substantive California law applies. (ECF No. 1 at 6.) California law requires that "[e]very
5 action must be prosecuted in the name of the real party in interest" Cal. Civ. Proc.
6 Code § 367. Under California law, the real party in interest is "the person or entity
7 possessing the right sued upon" Arnolds Mgmt. v. Eischen, 158 Cal. App. 3d 575,
8 581 (1984).

9 In the present case, Defendants contend that Plaintiffs do not actually own the
10 subject property, and thus Plaintiffs are not the real party in interest. The Complaint
11 alleges that "[a]t all times relevant to this action, Plaintiffs have owned the Property
12 located at 1141 Snow Crest Road, Alpine Meadows, California 96146." (ECF No. 1 at
13 5.) However, the Court has taken judicial notice of the grant deed recorded in the Placer
14 County Recorder's Office on January 26, 2009, see supra, which establishes that
15 Plaintiffs deeded the property to Kinman Properties, LLC, on March 19, 2008. Thus, the
16 individual Plaintiffs do not own the subject property, and did not own it at the time of
17 Defendants' alleged misconduct. Accordingly, Plaintiffs do not possess the rights they
18 sue upon in their Complaint. The rights sued upon are presumably possessed by
19 Kinman Properties, LLC, the entity which owns the subject property. Plaintiffs are
20 therefore are not the real parties in interest under Rule 17.

21 It is not clear that Plaintiffs' mistake in bringing suit in their own names, rather
22 than bringing suit as Kinman Properties, LLC, was an "understandable" one. See
23 Dunmore, 358 F.3d at 1112. However, there is also no evidence before the Court
24 suggesting that Plaintiffs made a strategic decision to sue in their own names, or acted
25 in bad faith. Cf. Wulff, 890 F.2d at 1075. Thus, the Court will give Plaintiffs the benefit of
26 the doubt and apply the Rule 17(a)(3) safety valve.

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1 Accordingly, the Court gives the real-party-in-interest (presumably Kinman Properties,
2 LLC) fourteen (14) days to ratify, join, or be substituted in the current action. If the real-
3 party-in-interest fails to do so, the Court will dismiss the Complaint with prejudice.

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5 **CONCLUSION**

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7 For the reasons set forth above, IT IS HEREBY ORDERED that Defendants'
8 Rule 17 Objection (ECF No. 20-1 at 9) is GRANTED, and the real-party-in-interest shall
9 ratify, join, or be substituted into the action within fourteen (14) days of the entry of this
10 Order. Failure to do so will result in dismissal of Plaintiffs' Complaint (ECF No. 1) with
11 prejudice.

12 IT IS SO ORDERED.

13 Dated: February 8, 2013

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16 MORRISON C. ENGLAND, JR., CHIEF JUDGE
17 UNITED STATES DISTRICT JUDGE
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